

# APPENDIX G

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Regional  
General Permits



"The following technical report reflects the findings and data available at the time the report was prepared and may not represent the current conclusions and steps forward in the main text of the HAMP, which has been updated after the completion of these reports. These more detailed technical reports provided in the appendices represent the foundation for the overall approach to the HAMP, but are not "living" documents that reflect updated steps forward, costing, quantities, etc. presented in the main text of the HAMP. The main text of the HAMP represents more current information and recommendations based on updated information, new studies, changes in conditions, new funding sources, and/or new regulations."

# HARBOR AREA MANAGEMENT PLAN

## REGIONAL GENERAL PERMIT Technical Report

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## **1.0 INTRODUCTION**

Currently, most maintenance and improvement activities on docks, seawalls, basins, and channels in lower Newport Bay (south of North Star Beach) are carried out under a variety of federal, state, and regional permits. The principal permits are the US Army Corps of Engineers (USACE) Regional General Permit (RGP) 54 (USACE, 2005), the California Coastal Commission's (CCC) coastal development permit CDP5-06-117, and waste water discharge requirements from the Santa Ana Regional Water Quality Control Board (RWQCB; see section 2 for more detail on the regulatory setting of the RGP and CDP). The RGP is the controlling document as, typically, the CDP renewal process follows on and conforms to the RGP process, and the CDP and the RWQCB permit reflect the RGP's conditions; accordingly, this analysis considers only the RGP.

A number of activities and several areas of the lower bay are not covered by the RGP; for example, sediment toxicity issues have placed several areas such as the Rhine Channel, Promontory Bay, and the West Newport channels (Figure 1) outside the permit coverage. The RGP allows dredged sediments deemed suitable for unconfined aquatic disposal to be disposed of either for beach nourishment inside the bay, if the grain size profile is appropriate, or at the LA-3 ocean disposal site for fine material.

The City of Newport Beach (CONB) Harbor Resources Division administers the RGP, serving as a clearinghouse for private work and undertaking bay-wide and/or expensive activities such as sediment testing, eelgrass surveys and management, and most regulatory interactions. In fact, for the current RGP CONB has developed a streamlined process that includes a consolidated permit application form, standardized screening of permit applications, computer-based permit tracking, and an efficient system for handling the multiple agency notifications and information requests. CONB's permit administration system has proven to be effective for managing a complex set of permits, and could serve as a model for other coastal cities with similar regulatory issues.

In accordance with USACE policy, the RGP has a five-year duration, meaning that it must be renewed every five years. The CONB has experienced significant delays and incurred considerable costs in obtaining and renewing the RGP, and is seeking to streamline the process by identifying both the stumbling blocks and possible resolutions.

## 2.0 KEY ISSUES

The CONB has identified several issues that are currently hampering the efficient administration of the permits and that have resulted in significant delays and additional costs for necessary harbor maintenance and improvement. These are, generally, the lengthy, complex permit renewal process; the restricted coverage and extensive special conditions of the permits; sediment contamination, which in several areas is not addressed by the permits and for which CONB has no disposal site; and the current policies with respect to management of eelgrass in lower Newport Bay, which have virtually prohibited dredging and beach nourishment in some areas.



Figure 1. RGP 54 Coverage

## 2.1 Permit Renewal Process

Based on their experience with the most recent renewal process, CONB is concerned that it could take as long as three years (and \$500,000) to renew the five-year permit. They view this delay as being due to a number of factors, including the difficulty of getting the sediment Sampling and

Analysis Plan (SAP) approved, the length of time the sediment testing can take, and the difficulty of resolving the various agency agendas into appropriate permit language.

USACE South Coast staff do not perceive a problem with the process. They believe that the current permit is a sound template for future renewals (unless CONB should want to change the permit). In USACE's view there is a template SAP that will be easy to approve, so that the sediment testing should be straightforward. The existing permit is acceptable to the agencies, and once sediment testing is completed per the SAP the renewal should take a matter of four months (per Special Condition I(g)). The history of sediment contamination and testing and the current strategy for developing and implementing the SAP for future testing are discussed in the Dredging Requirements and Contaminated Sediment Technical Report.

## **2.2 Restricted Coverage**

As mentioned above, RGP 54 does not cover dredging in several key areas of Newport Bay because those areas have histories of sediment contamination. The RGP covers disposal of clean sediments only (as beach nourishment material or at the LA-3 ocean disposal site); the RGP does not contain provisions for management of contaminated sediment, so that it is not possible to allow dredging and disposal of such sediments under the RGP. As a result, many activities in those areas must go through the normal permitting process rather than the expedited RGP process. CONB would like to see the excluded areas included in the RGP with appropriate restrictions on dredging, disposal, and other in-water work.

## **2.3 Special Conditions**

The current RGP has 18 pages of special conditions. Many of these are standard USACE/EPA conditions related to notifications, reporting, and limits, and much of the length of the conditions is attributable to several pages of redundancy with respect to excluded areas and activities. CONB believes that many of the conditions related to dredge and disposal tracking and monitoring are so conservative as to unnecessarily constrain small projects. Of special concern to CONB, however, are the conditions related to eelgrass protection, monitoring, and mitigation, and to ocean disposal. CONB views many of these as overly restrictive, given the limited nature of the activities conducted under the RGP. The result of the restrictions is that many minor dredging operations either are precluded entirely by the presence of eelgrass or are rendered financially infeasible for private entities because of the cost of providing the information and complying with the restrictions associated with eelgrass and ocean disposal.

## **2.4 Sediment Contamination**

As mentioned above and described in the Dredging Requirements and Contaminated Sediment Technical Report, several areas of Newport Bay are not covered by the RGP because of sediment contamination. This issue is problematic largely because of the lack of an approved disposal site for contaminated sediments, which prevents dredging projects that involve contaminated sediments from being approved through the streamlined RGP process. Instead, CONB has to

wait until a disposal opportunity arises and then conduct additional sediment testing to be covered under RGP 54 (Special Condition III(d and e)).

## **2.5 Eelgrass**

NOAA Fisheries has determined at the national level that eelgrass (*Zostera marina*) beds constitute sensitive habitat under several programs, including the Essential Fish Habitat provision of the Magnuson-Stevens Act (eelgrass is designated as a Habitat Area of Particular Concern in the Pacific Groundfish EFH designation [PFMC 2005], affording the resource EFH protection). Losses of eelgrass, therefore, must be avoided and minimized to the extent practicable, and unavoidable losses must be mitigated.

As described in the Eelgrass Technical Report, eelgrass coverage in Newport Bay varies from year to year, and according to both CONB and NMFS personnel (personal communication, 2007) it is currently in a high-coverage phase (70% of the historic maximum). NMFS believes that at the moment eelgrass is growing nearly everywhere it can, and tentatively attributes the current lush growth to improved water quality (that, in turn, suggests that high coverage will continue and the issue will not abate of its own accord). In NMFS's view, the best growth is in the area between the eastern end of Balboa Island and the Lido peninsula, as well as the entrance channel – those areas are what might be termed the “core” of eelgrass in Newport Bay. CONB, on the other hand, indicates that eelgrass is widespread throughout the bay; for example, there is a persistent bed in the embayment of Linda Isle. In general, it would appear that eelgrass persists in the core area but is ephemeral in other areas of the bay.

Eelgrass is an especially important issue because the RGP's special conditions prohibit dredging or disposal within 15' of established eelgrass plants unless mitigation, in the form of replanting elsewhere nearby, can be provided. The guidelines that form the special conditions were developed by the NMFS as standard best management practices for Southern California coastal areas and are not specific to Newport Bay. Given the widespread coverage of eelgrass under and adjacent to docks in Newport Bay, these restrictions have severely curtailed maintenance in some areas of the bay. NMFS staff recognize the dilemma but are committed to giving eelgrass the protection they believe it warrants and that the law and agency guidelines mandate, particularly given their position that the eelgrass was there first and thus, arguably, has priority over recreational boating.



### **3.0 IMPROVEMENT OF THE RGP PROCESS**

Recognizing these issues, the City's goal is to make its implementation of the RGP achieve the necessary balance between environmental protection and beneficial uses. To achieve that goal the City must obtain regulatory permits that recognize the particular circumstances of Newport Harbor, and administer those permits for the benefit of both the boating community and the natural environment. To that end, the RGP implementation strategy should emphasize establishing sound relationships with the regulatory agencies, articulating clear goals and objectives for future permits, and developing a sound, cost-effective strategy for the permit renewal process. Coordination with other management programs and with the renewal process for the Coastal Development Permit (CDP) should minimize the delays and expense compared to the previous renewal effort. The goal is to obtain permits that have clear, flexible, effective conditions that allow the City to protect its natural resources while safeguarding its beneficial uses.

There are several specific issues that should be addressed during the RGP renewal process in order to improve the City's ability to implement the RGP: extending the duration of the permit, streamlining the formulation and approval of the sampling and analysis plan, extending the geographic coverage of the permit, streamlining and clarifying permit conditions, improving management of eelgrass in order to be able to negotiate more favorable permit conditions, and increasing the scope of beach nourishment under the RGP.

The RGP renewal strategy should be based on an early, comprehensive effort to identify the key issues with the various stakeholders, provide necessary information, and conduct negotiations. The renewal effort needs to be undertaken with clear objectives in view and a strong sense of what can be negotiated and what cannot. This effort is best accomplished by preparation of a written renewal strategy that will guide the efforts of the City and its consultants. The strategy will describe how the various components will fit together and will provide guidance on negotiation strategies and desired outcomes.

#### **3.1 Permit Duration**

A permit duration of 10 years would facilitate permit administration and reduce the financial and administrative burden on the City and the regulatory agencies, and has the support of USEPA Region 9 headquarters. Nevertheless, USACE Los Angeles District apparently has no authority to grant a 10-year permit. Furthermore, the sediment test results would not be valid for a 10-year period, and the City would still have to go through a 5-year renewal cycle for the Coastal Development Permit. Accordingly, pursuing a 10-year RGP may be most productive at the level of USACE regulatory headquarters in Washington, D.C.

#### **3.2 Streamline Sampling Plan Approval**

A template for a Sampling and Analysis plan that specifically details all possible outcomes could be created with input from all involved agencies to ensure acceptance prior to sampling. The Sampling and Analysis Plan may include recommendations for phased testing to target specific

disposal activities, including dredging in currently restricted areas such as the Rhine Channel, Promontory Bay, and the West Newport Channels. The RGP renewal process should be coordinated with the efforts of the Dredging Requirements and Contaminated Sediment component of the HAMP.

### **3.3 Geographical Coverage**

It would be possible to extend RGP 54 to the currently excluded areas if the City could commit to placing the sediments in a previously-approved disposal site. As a long-term disposal site outside the city is financially and logistically infeasible, identifying and developing an in-bay confined disposal site for contaminated sediments is a recommended course of action. Development of such a site would be a substantial undertaking that would require coordination of several HAMP elements (at a minimum, the Dredging Requirements and Contaminated Sediment, Eelgrass Capacity, and Hydrodynamic and Water Quality elements), intensive coordination with the resource and regulatory agencies, and a public education and environmental documentation (EIS/EIR) effort. Weston believes, however, that the potential benefits to the City and to the regulators from extending the permit's coverage would make the effort worthwhile.

### **3.4 Streamlining Special Conditions**

The RGP's special conditions could be streamlined by (1) simplifying the language and removing redundancies, (2) developing a more straightforward system for monitoring the dredging and disposal activities, and (3) developing an eelgrass management plan that would be protective of eelgrass resources while not being unnecessarily burdensome to dredgers.

Currently many of the RGP users do not have the financial resources to manage contaminated sediments, to comply with the eelgrass requirements, or to comply with the ocean disposal monitoring requirements. The RGP could be revised to incorporate guidance and options for these issues that would make more small dredging projects feasible. Specific areas of the RGP that could be revised are addressed in the detailed recommendations (Section 4).

### **3.5 Eelgrass Management**

The RGP could be modified to incorporate a comprehensive, bay-wide eelgrass management plan in such a way as to achieve the twin goals of eelgrass protection and the facilitation of maintenance dredging and structural work. As described in the Eelgrass Capacity Management Technical Report, there are two possible models for the eelgrass component of the permit. Option 1 would recognize that boating has priority in some areas, eelgrass in others (this option would be consistent with the goals of the Harbor Area Management Plan, which would balance various uses in the bay). Option 2 would establish a baseline eelgrass population for a portion of the bay, and the RGP would acknowledge this area.

Close coordination would be needed with the Department of Fish and Game and National Marine Fisheries Service (NMFS) eelgrass management plan in order to develop modifications of the

RGP's special conditions that would be effective and at the same time responsive to agency imperatives. See Appendix B for more detail.

### **3.6 Beach Replenishment**

Currently the RGP allows dredging projects of less than 1,000 cy to be used for beach replenishment, assuming the material is physically and chemically suitable. Increasing the volume of dredged material that can be beneficially used for beach replenishment under the RGP may increase opportunities to use the dredged material. The specific details of beach nourishment opportunities and needs are described in the Beach Replenishment Technical Report; the RGP renewal negotiations would use that report to support modified permit language.

## 4.0 RECOMMENDATIONS

Weston has developed recommendations that address specific Special Conditions of the current version of RGP 54 (Table 1). The recommendations are based upon discussions with Harbor Resources personnel, USACE Regulatory Branch personnel, and NOAA Fisheries personnel. Only those conditions for which changes are recommended or have been suggested are included.

Harbor Resources personnel have also suggested that two conditions of the Coastal Development Permit should be changed. Neither of these conditions is on the RGP, and both make administration of the CDP more difficult without adding environmental protection. Condition I(i) establishes the permit duration as three years; Weston concurs that the CDP should have the same duration as the RGP. Condition II(d) requires implementation of “Clean and Green” measures in the harbor. Harbor Resources points out that the program is voluntary and that there is no basis for making them mandatory. Weston concurs with Harbor Resources’ suggestion that the language be changed to “The City shall continue to promote its “Clean and Green” program throughout the harbor district.”

**TABLE 1. SPECIFIC RECOMMENDATIONS FOR CHANGING SPECIFIC SPECIAL CONDITIONS OF THE RGP**

CONDITION	RECOMMENDATION
I(c)iv	Because many of the beaches are too small for five photographs to be reasonable, Weston recommends changing the sentence to read “As many photos as are necessary to portray the beach area...”
I(e)i	CONB has suggested that it is vulnerable to the requirement that an independent eelgrass expert has to conduct the surveys. Currently, CONB contracts with the expert, but if that arrangement were to be challenged, CONB has no written agreement that it is authorized to administer that function.  Weston does not recommend pursuing this issue. The current informal arrangement is in everyone’s interests, but if the issue is raised the agencies could feel obligated to take a less permissive stance.
I(e)ii	CONB would like this condition to permit precision dredging within 15 ft of eelgrass and to eliminate the prohibition on in-kind replacement and repair, in order to facilitate small-scale berth maintenance. In addition, above-water work should be exempted entirely so long as the shaded area does not increase.  Weston concurs that this is a reasonable goal, and recommends that in order to achieve that goal in the next renewal process CONB proactively offer construction best management practices that would provide NOAA Fisheries with assurances that eelgrass would be protected. Measures should include mandatory silt curtains for dredging and pile removal/placement, photographic before/after verification that the work does not increase shading of eelgrass, and an on-site construction inspector authorized to shut down work if necessary.
I(e)iv(2)	According to CONB staff, the approval of individual permit applications takes so long that the survey required by this condition often expires before approval is granted, because the surveys are submitted with the applications.

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CONDITION	RECOMMENDATION
	Weston concurs with CONB's suggestion that the permit application merely indicate whether or not eelgrass is present at the project site, and that the survey be conducted within 60 days of the start of work. Note that this condition (reiterated in I(e)vi) does not actually require that the survey be submitted with the application. Therefore, Weston recommends that CONB raise this issue with USACE to determine whether that agency is willing to accept a presence/absence indication with the application and allow CONB to ensure that the survey is conducted before the start of work in compliance with this condition. The permit management system currently in place could easily be adapted to ensure USACE receives the survey in a timely manner.
I(f)	<p>CONB would like to see the survey timing restrictions for <i>Caulerpa</i> parallel those of eelgrass, so that both surveys can be done at the same time and have the same "shelf life".</p> <p>Weston recommends that this issue be raised with NOAA Fisheries, but notes that the timing is standard wording representing regional agency policy, so that altering it may involve extensive negotiations.</p>
I(g)	<p>This condition, although it does not expressly so state, could be interpreted as requiring full Green Book testing throughout the harbor in order to renew the RGP. CONB points out that testing has been going on for the past 30 years and that the constituents of concern are well known. CONB would like to ensure that future testing is focused on those constituents at the Tier I level.</p> <p>Weston recommends that this issue not be addressed through changes in the wording of the RGP, but rather through the SAP for the renewal process (i.e., the Dredging Requirements and Contaminated Sediments element). The SAP should be formulated and approved in consultation with EPA, which has expressed support for focused testing. The current wording of the RGP would not contradict such an approach. It would be especially helpful to have EPA present at SAP negotiations with CCC, possibly including testimony at a Commission hearing for the consistency certification of the new RGP.</p>
II(b)	<p>CONB has expressed a desire to have this condition specify that bulkhead replacement landward of an existing bulkhead is permitted.</p> <p>Given, however, that this permit is for maintenance of existing structures and explicitly prohibits new work, Weston recommends that the CONB not pursue this issue. RGP 54 should remain focused on maintenance: repairs, minor modifications, and removal of accumulated material to previously authorized depths.</p>
II(j), III(l)	<p>These conditions are standard in USACE dredging permits. For this situation, however, notifications to USCG XI District and Coast Guard Marine Safety Office in San Pedro would appear to be superfluous, since the Coast Guard has told CONB it has no interest in or use for the information. NOAA (condition II(n)) is a similar case: the survey information from minor maintenance dredging is not used in NOAA mapping and survey activities.</p> <p>Weston recommends that for the next RGP renewal process CONB request that the notification language be changed to omit NOAA entirely and to require CONB to notify</p>

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CONDITION	RECOMMENDATION
	the Newport Harbor Coast Guard unit of upcoming dredging activities. This request could be justified in terms of the paperwork and personnel savings to USCG, NOAA, and CONB.
III(b)	<p>This condition restricts maintenance dredging to -7 ft MLLW, but the USACE authorized depth for most of the harbor is -10 ft MLLW.</p> <p>Weston recommends that the RGP renewal request -10 as the maximum dredge depth. The SAP, of course, would need to test appropriately, and such testing would not, at depths below -7' MLLW, be restricted to focused Tier 1 testing. The USACE, EPA, and CCC would undoubtedly require full testing of material that has not been tested in previous years, as would be the case with most of the material below -7' MLLW.</p> <p>CONB should be prepared, however, for the counter argument that the USACE authorized depth is irrelevant, that the definition of maintenance dredging is restoring previously dredged, not authorized, depths.</p>
IV(l), (m)	<p>These conditions are standard language for USACE dredging permits, and they were designed with large-scale projects in mind. They are not really practicable for the single-load, small-contractor projects characteristic of Newport Bay, since most of the contractors do not have the capability of real-time tracking and web posting. Dredgers have indicated that they will not undertake small projects if they have to comply with the language.</p> <p>Weston recommends that the RGP renewal process explore the possibility of deleting these two conditions and replacing them with a condition that requires trip and dump logging on the basis of GPS positioning, and post-trip submission of the track plot. Weston expects the USACE to be amenable to such a proposal.</p>

## **5.0 REGULATORY ENVIRONMENT**

The activities authorized by the RGP and the CDP are governed by several federal and state laws and by the regulations promulgated under those laws. The principal federal laws are: Clean Water Act (CWA), Marine Protection, Research, and Sanctuaries Act (MPRSA), Endangered Species Act (ESA), Magnuson-Stevens Fisheries Conservation and Management Act, the Coastal Zone Management Act (CZMA), and the River and Harbor Act. The principal state laws are the California Coastal Act, which implements the federal CZMA; the California Endangered Species Act (CESA); and the Porter-Cologne Act, which implements the federal CWA.

RGP 54 is a federal permit issued by the USACE, with the concurrence of the US EPA, and is the only permit needed for maintenance activities in waters of the United States. The USACE issues its permit pursuant to the Section 404 of the CWA, Section 10 of the River and Harbor Act, and Section 103 of the MPRSA. However, Corps regulations prohibit permit issuance until the Corps is assured that the permitted activities will comply with all other applicable state and federal laws and regulations. This it does by obtaining concurrence from other agencies in the form of certifications or consultations.

The approvals needed for RGP issuance (and renewal) include a certification from the Regional Water Quality Control Board (RWQCB) that the activities comply with Section 401 of the CWA (and, therefore, with the Porter-Cologne Act), a certification from the Coastal Commission that the activities comply with the California Coastal Act (and, therefore, with the CZMA), and concurrence from the federal and state wildlife resources agencies (US Fish and Wildlife Service, NOAA Fisheries, and California Department of Fish and Game) that the activities will comply with the ESA, the CESA, and the Magnuson-Stevens Fisheries Act. These other approvals typically result in additional special conditions on the RGP.

The Coastal Commission exercises its mandate through the coastal development permit and the coastal consistency certification process. In early 2006 the Commission granted CONB CDP 5-06-117, whose conditions closely parallel those of the RGP, and Federal Consistency CC-031-06.

## **6.0 REFERENCES**

Pacific Fishery Management Council. 2005. Amendment 18 (Bycatch Mitigation Program)/Amendment 19 (Essential Fish Habitat) to the Pacific Coast Groundfish Fishery Management Plan for the California, Oregon, and Washington Groundfish Fishery. <http://www.pcouncil.org/groundfish/gffmp/gfa19/A18-19Final.pdf>

United States Army Corps of Engineers (USACE). 2005. Regional General Permit 54 (File No. 200501233-DPS). <http://www.spl.usace.army.mil/regulatory/RGP54.pdf>